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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 120

**ERNEST NEWTON KALB AND MARGARET KALB,
HIS WIFE, APPELLANTS,**

vs.

**HENRY FEUERSTEIN AND HELEN FEUERSTEIN,
HIS WIFE**

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

FILED JUNE 19, 1939.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 120

ERNEST NEWTON KALB AND MARGARET KALB,
HIS WIFE, APPELLANTS,

vs.

HENRY FEUERSTEIN AND HELEN FEUERSTEIN,
HIS WIFE

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

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**IN CIRCUIT COURT OF WALWORTH COUNTY,
STATE OF WISCONSIN**

ERNEST NEWTON KALB and MARGARET KALB, Plaintiffs,

vs.

**HENRY FEUERSTEIN and HELEN FEUERSTEIN, his wife,
Defendants**

COMPLAINT—Filed Sept. 10, 1937

And now comes the above named plaintiffs and by their attorney J. J. McManamy, alleges and shows to the court:

That they are residents of Walworth County, Wisconsin, and have resided in said county for a great many years prior to the commencement of this action.

That the defendants are residents of the same county.

That at and during all of the time and times herein mentioned the plaintiffs were the owners of and were in possession of certain real estate, and that the premises consisted of a farm of 120 acres, part of which constituted the homestead of the plaintiffs, said real estate being described as follows:

The northwest quarter of the northwest quarter and the north half of the southwest quarter of the northwest quarter of Section Fourteen (14) and the northeast quarter of the northeast quarter and the north half of the southeast quarter of the northeast quarter of Section Fifteen (15), all in Town One (1), North, Range Fifteen (15) East, Walworth County, Wisconsin.

That sometime prior to March 7, 1933, these plaintiffs executed and delivered to the defendants a certain mortgage describing the said real estate to secure the payment of a loan and that on or about March 7, 1933, the defendants herein commenced an action in the County Court of Walworth County, for the foreclosure of the said mortgage. That judgment of foreclosure was entered on the 21st day of April, 1933, in that court.

That by act of the Congress of the United States Section 75 of an act of Congress entitled "An Act to Establish [fol. 5] a Uniform System of Bankruptcy throughout the

United States", approved July 1, 1898, as amended, was further amended on August 28, 1935, 49 Statutes at Large, 943, Chap 792, such amendment being popularly known as the New Frazier-Lemke Act. That on the 2nd day of October, 1934, the plaintiff Ernest Newton Kalb invoked in his behalf the provisions of section 75 of the Bankruptcy Act, as amended, by filing in the District Court of the United States for the Eastern District of Wisconsin his petition and schedules; and on the same day order was made by the Court approving the petition as properly filed as provided by law, and thereafter certain proceedings were had on the plaintiffs behalf in said matter; that on June 27, 1935, an order was entered by the District Court of the United States for the Eastern District of Wisconsin dismissing the plaintiffs petition.

That on the 6th day of September, 1935, in the District Court of the United States for the Eastern District of Wisconsin an order was made reinstating the plaintiffs petition filed in said court on the 2nd day of October, 1934, and vacating the order made in said cause on the 27th day of June, 1935, and on the 9th day of September, 1935, a certified copy of the said order of the District Court of the United States for the Eastern District of Wisconsin, was filed in County Court of Walworth County, Wisconsin.

That on the 20th day of July, 1935, a sheriffs sale of the premises hereinbefore described was had under the judgment of foreclosure of the mortgage hereinbefore referred to, and thereafter the defendants herein gave notice to the plaintiffs that on the 9th day of September, 1935, they would apply to the County Court for Walworth County for an order confirming the sheriffs report of sale of the premises hereinbefore described.

That although on the 16th day of September, 1935, the District Court of the United States for the Eastern District of Wisconsin had exclusive jurisdiction of the person of the plaintiffs and of all of their property, both real and personal, for the purpose of carrying out the provisions of the act of Congress hereinbefore referred to, and exclusive jurisdiction of all judicial or official proceedings in any court under the direction of any official and of all creditors, public and private, and to all of the debtors property wherever located, Roscoe R. Luce, Judge of the County Court of Walworth County, did, on the 16th day of September, 1935, arbitrarily and capriciously sign an instru-

ment purporting to confirm the sheriffs report of sale had on the 20th day of July, 1935, of the premises hereinbefore described, such report setting forth that said premises had been sold to the defendants Henry Feuerstein and Helen Feuerstein. That thereafter one George O'Brien arbitrarily and capriciously executed and delivered to these defendants an instrument in the form of a sheriffs deed of sale on foreclosure, such deed is recorded in the office of the Register of Deeds for Walworth County, Wisconsin, in Vol. 240 of Deeds, page 464.

That on the 16th day of December, 1935, the said Roscoe R. Luce arbitrarily and capriciously signed an instrument which he designated "Order for Writ of Assistance", such instrument purporting to direct the Clerk of the County Court of Walworth County to issue a writ of assistance, and that on the 16th day of December, 1935, one Henry D. Dunbar, as clerk of said court, arbitrarily and capriciously signed an instrument purporting to be a writ of assistance and such instrument was delivered to one George O'Brien, as sheriff of said county, purporting to direct him to remove the plaintiffs herein from the above described premises, and dispossess them thereof, and thereafter the said George O'Brien, his agents, servants and employees, entered upon the premises of the plaintiff hereinbefore described, and by force removed the plaintiffs and their family, together with all of their personal property therefrom, and did actually place in possession of said premises the defendants herein, [fol. 7.] and that the said defendants have been in possession of said premises from the 12th day of March, 1936, and refuse to deliver possession of said premises to the plaintiffs herein.

That on the 6th day of September, 1935, and at all times thereafter mentioned, the petition of the plaintiff, Ernest Newton Kalb, under Section 75 of the Act of Congress to establish a uniform system of Bankruptcy throughout the United States, was pending in the District Court of the United States for the Eastern District of Wisconsin.

These plaintiffs allege that on the 16th day of September, 1935, the County Court for Walworth County and Roscoe R. Luce, as Judge thereof, had no jurisdiction of the person of the plaintiffs or any of their property, real or personal. That exclusive jurisdiction thereof was vested in the District Court of the United States for the Eastern District of Wisconsin, and that the instrument signed by Roscoe R.

Luce September 16, 1935, purporting to confirm the sheriff's report of sale, is wholly void, and that the instrument signed by George O'Brien, as sheriff, purporting to be a deed of the premises, is void, and that the instrument signed on the 16th day of December, 1935, purporting to direct the Clerk of the said county Court to issue a writ of assistance is wholly void, and that the instrument signed by the Clerk of said Court on the 16th day of December, 1935, purporting to direct the sheriff of Walworth County to remove the plaintiffs from the said premises and dispossess them thereof is wholly void, and the acts of George O'Brien, sheriff for said county, on the 12th day of March, 1936, was unlawful and wrongful, and that his acts in placing the defendants in possession of said premises is unlawful and that the defendants have wrongfully and unlawfully been in possession of said premises from said date without any right or title thereto.

Wherefore, these plaintiffs demand judgment:

(a) That the instrument executed by George O'Brien as sheriff for Walworth County, and recorded in the office of [fol. 8] the Register of Deeds for said County in Vol. 240 of Deeds, page 464, be cancelled and expunged from the records of said office.

(b) That the defendants Henry Feuerstein and Helen Feuerstein be removed from said premises.

(c) That the plaintiffs herein be placed in possession thereof.

(d) That the plaintiffs have their costs and disbursements herein.

J. J. McManamy, Plaintiff's Attorney, 1 West Main Street, Madison, Wisconsin.

Duly sworn to by Ernest Newton Kalb. Jurat omitted in printing.

[fol. 9] [File endorsement omitted.]

[fol. 10] IN CIRCUIT COURT OF WALWORTH COUNTY

[Title omitted]

DEMURRER—Filed Sept. 22, 1937

Now comes the above named defendants, Henry Feuerstein and Helen Feuerstein, his wife, by Moran & O'Brien,

their attorneys, and demur to the complaint of the plaintiffs in the above entitled action, and specify as grounds of objection thereto—

That it appears from the face of said complaint that the same does not state facts sufficient to constitute a cause of action.

Moran & O'Brien, Attorneys for Defendants, Henry Feuerstein and Helen Feuerstein, his wife.

Dated September 17, 1937.

[fol. 11] [File endorsement omitted.]

Service admitted Sept. 18, 1937. J. J. McManamy, Attorney for Plaintiff.

[fol. 12] IN CIRCUIT COURT OF WALWORTH COUNTY

[Title omitted]

NOTICE OF HEARING—Filed Oct. 28, 1937

Please take notice that the issues raised by the demurrer in the above entitled action will be brought on for trial before the Court at the Court House in the city of Elkhorn, Walworth County, Wisconsin, on the 1st day of November, 1937, at 10:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard.

J. J. McManamy.

To: Moran and O'Brien, Delavan, Wisconsin, Attorneys for the Defendants.

Service admitted this 16th day of October, 1937. Moran & O'Brien, Attys. for Defendants.

[fol. 13] [File endorsement omitted.]

[fol. 14] IN CIRCUIT COURT OF WALWORTH COUNTY

[Title omitted]

ORDER SUSTAINING DEMURRER—Filed December 20, 1937

The above entitled action having been brought on for trial upon the issues of law joined herein; and after reading and

filing the brief of Moran and O'Brien, attorneys for the defendants, and the briefs of J. J. McManamy attorney for the plaintiffs; and both of the parties hereto having waived oral argument in said matter;

On Motion of Moran & O'Brien, attorneys for the defendants,

Now, Therefore, It Is Ordered, that said demurrer be sustained, and that the defendants have judgment thereon, but with leave to the plaintiffs to amend the complaint within twenty days from the date of service of this order, upon payment of the sum of Ten (\$10.00) Dollars, costs.

Dated December 17th, 1937.

By the Court:

Edgar V. Werner, Judge.

[fols. 15-16] [File endorsement omitted.]

[fols. 17-18] IN SUPREME COURT OF WISCONSIN

Walworth Circuit Court

ERNEST NEWTON KALB and MARGARET KALB, Appellants,

vs.

HENRY FEUERSTEIN and HELEN FEUERSTEIN, his Wife,
Respondents

Opinion by Chief Justice Rosenberry

JUDGMENT—May 17, 1938

This cause came on to be heard on appeal from the order of the Circuit Court of Walworth County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the Circuit Court of Walworth County appealed from in this cause, be, and the same is hereby, affirmed with costs against the said appellants taxed at the sum of Sixty-three and 04/100 (\$63.04) Dollars.

[fol. 19]

[File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

No. 104. January Term, 1938

ERNEST NEWTON KALB et al., Appellants,

vs.

HENRY FEUERSTEIN et al., Respondents

Appeal from an order of the circuit court for Walworth county: Edgar V. Werner, Circuit Judge. Affirmed.

This action was begun on September 1, 1937, by Ernest Newton Kalb and Margaret Kalb, plaintiffs, against Henry Feuerstein and Helen Feuerstein, his wife, to expunge from the records of the office of the register of deeds of Walworth County, a deed executed by George O'Brien as sheriff to the defendants and for the removal of the defendants from the premises and putting the plaintiffs in possession thereof. From the order sustaining the demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, entered on December 17, 1937, the plaintiffs appeal.

[fols. 20-21] OPINION—Filed May 17, 1938

ROSENBERRY, C. J.

The question sought to be raised in this case is the same question dealt with in a companion case, Ernest Newton Kalb, Appellant, v. Roscoe R. Luce et al., Respondents, decided herewith, and for the reasons there stated the order sustaining the demurrer to the complaint should be affirmed.

By the Court: The order appealed from is affirmed.

[fols. 22-23] IN SUPREME COURT OF WISCONSIN

[Title omitted]

MOTION FOR REHEARING—Filed June 2, 1938

The appellant moves for a rehearing in this case on the only question discussed in the opinion of the Court.

Dated: June 2, 1938.

J. J. McManamy, Attorney for Appellants.

[File endorsement omitted.]

[fols. 24-25] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER DENYING REHEARING—June 29, 1938

The Court being now sufficiently advised of and concerning the motion of the said appellants for a rehearing in this cause, it is now here ordered that said motion be, and the same is hereby, denied without costs.

[fols. 26-42] IN SUPREME COURT OF WISCONSIN

[Title omitted]

[File endorsement omitted.]

OPINION—Filed June 27, 1938

Rosenberry, C. J. On motion for rehearing. The memorandum in Number 105, Ernest Newton Kalb, Appellant, v. Roscoe R. Luce et al., Respondents, decided herewith, covers both cases and for the reasons stated in Number 105, the motion for rehearing is denied.

By the Court.—Motion for rehearing is denied without costs.

[fol. 2] IN CIRCUIT COURT OF WALWORTH COUNTY

[Title omitted]

NOTICE OF APPEAL—Filed in Supreme Court, February 11, 1939

Please Take Notice That the plaintiff, Ernest Newton Kalb, above named, hereby appeals to the Supreme Court of the State of Wisconsin from a judgment rendered by the above named Court herein, entered on the 31st day of December, 1938, in favor of the defendants and against the plaintiff dismissing the plaintiff's complaint and directing costs be assessed against the plaintiff and from the whole of such judgment.

Dated this 24th day of January, 1939.

J. J. McManamy, Plaintiffs' Attorney.

To: Moran & O'Brien, Attorneys for Henry Feuerstein and Helen Feuerstein.

To: Harry Dunbar, Clerk Circuit Court, Walworth County, Wisconsin.

[File endorsement omitted.]

[fol. 3] Bond on appeal for \$250.00, filed Feb. 11, 1939, omitted in printing.

[fols. 4-5] Affidavits of service of notice and bond omitted in printing.

[fol. 6] Harry D. Dunbar, Filed Jan. 27, 1939. Clerk of Courts.

[fol. 7] IN CIRCUIT COURT OF WALWORTH COUNTY

[Title omitted]

AFFIDAVIT OF DEFAULT—Filed January 3, 1939

STATE OF WISCONSIN,
County of Walworth, ss:

J. Arthur Moran, being first duly sworn, on oath, says that he is one of the attorneys for the defendants in the above entitled action; that although an order was entered on the 17th day of December, A. D., 1937, granting leave to the plaintiffs to amend their complaint within twenty days from the date of service of such order, no such amended complaint has been served upon the defendants or their attorneys, and that the said plaintiffs are now in default under said order; and that this affidavit is made for the purpose of showing cause why the plaintiffs' complaint should be dismissed with costs to the defendants.

J. Arthur Moran.

Subscribed and Sworn to before me this 29th day of December, 1938. Beth A. Strong, Notary Public, Walworth County, Wis. (Seal.)

[fol. 8] [File endorsement omitted.]

[fol. 9] IN CIRCUIT COURT OF WALWORTH COUNTY

ERNEST NEWTON KALB and MARGARET KALB, Plaintiffs,

vs.

HENRY FEUERSTEIN and HELEN FEUERSTEIN, his wife,
Defendants

JUDGMENT—Filed January 3, 1939 .

An order having been entered in this action on the 17th day of December, A. D., 1937, sustaining a demurrer to the complaint herein and giving the said plaintiffs leave to amend their complaint within twenty days after service of such order and upon payment of the sum of Ten (\$10.00) Dollars, costs; and a copy of said order having been served upon J. J. McManamy, attorney for the plaintiffs, on the 20th day of December, 1937, and more than twenty days having elapsed since such service and the plaintiffs having failed to amend their complaint;

Now, Therefore, On Motion of Moran & Q'Brien, attorneys for the defendants,

[fol. 10] It is Ordered and Adjudged, that the complaint herein be, and the same is hereby dismissed, and the defendants do have and recover costs of the said plaintiffs, taxed at One Hundred Five and 45/100 (\$105.45) Dollars.

Dated this 31st day of December, 1938.

By the Court:

Edgar V. Werner, Circuit Judge.

[fol. 11] [File endorsement omitted.]

[fol. 12] IN CIRCUIT COURT OF WALWORTH COUNTY .

[Title omitted]

NOTICE OF ENTRY OF JUDGMENT—Filed Jan. 12, 1939

To J. J. McManamy, Attorney at Law, Madison, Wisconsin.

SIR:

You Are Hereby Notified, that on the 31st day of December, 1938, judgment was duly entered in the above entitled matter, and that on the 7th day of January, 1939,

the costs were therein taxed and duly inserted in the judgment, a copy of said judgment being attached hereto and made a part of this notice.

Dated this 9th day of January, 1939.

Moran & O'Brien, Defendants' Attorneys.

Service admitted January 10, 1939.

J. J. McManamy, Attorney for Plaintiff.

[fols. 13-14] Judgment omitted. Printed side page 9 ante.

[fol. 15] [File endorsement omitted.]

[fol. 16] IN SUPREME COURT OF WISCONSIN

[File endorsement omitted]

ERNEST NEWTON KALB and MARGARET KALB, Appellants,

vs.

HENRY FEUERSTEIN and HELEN FEUERSTEIN, his wife,
Respondents

NOTICE OF MOTION TO ADVANCE—Filed March 25, 1939

Please Take Notice that on the 11th day of April, 1939, at the opening of Court on that day or as soon thereafter as counsel can be heard the appellants will move for an order:

- (a) To advance the cause on the calendar, and
- (b) That the cause may be decided by the Court without the filing of printed case and without further notice to the parties.

Dated this 20th day of March, 1939.

James J. McManamy, Attorney for Appellants.

To Moran & O'Brien, Attorneys for Respondents Henry Feuerstein and Helen Feuerstein.

Admission of Service admitted this 22nd day of March, 1939.

Moran & O'Brien, Attorneys for Respondents.

[fol. 17]

[Title omitted]

AFFIDAVIT OF JAMES J. McMANAMY**STATE OF WISCONSIN,****County of Dane, ss:**

James J. McManamy, being first duly sworn says, that he is the attorney for the appellants in this action and makes this affidavit in their behalf. That this cause was before this Court on April 12, 1938, on an appeal from an order sustaining a demurrer to the complaint and the appeal was decided by this Court on June 29, 1938 (228 Wis. 519) affirming the order sustaining the demurrer.

That thereafter an appeal was taken to the Supreme Court of the United States from the judgment of this Court. That the appeal was dismissed because final judgment had not been entered by the trial court.

That thereafter the record was remitted to the Circuit Court for Walworth County and judgment dismissing the complaint was entered in that Court.

That an appeal from the judgment so dismissing the complaint is now pending in this Court and the appellant is desirous of having the matter determined by this Court at the earliest date possible, and by his attorney James J. [fols. 18-19] McManamy makes this affidavit bringing these facts to the attention of the Court to the end:

(a) An order may be made advancing said cause on the calendar, and

(b) that the cause may be decided by this Court without the filing of printed case and without further notice to the parties.

James J. McManamy.

Subscribed and sworn to before me this 20 day of March, 1939. Mabel Graves, Notary Public, Dane County, Wis. (Seal.)

[fol. 20]

IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER DENYING MOTION TO AMEND FORMER OPINION—April 11, 1939

And now at this day came the said respondents, by their attorney, and moved the court now here to amend the former

opinion by deciding two additional questions, which motion having been argued by J. Arthur Moran, Esq., for the said respondents, and by J. J. McManamy, Esq., for the said appellant, and submitted, and the court being now sufficiently advised of and concerning the said motion, it is now here ordered that said motion be, and the same is hereby, denied.

[fol. 21] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER GRANTING MOTION FOR JUDGMENT ETC.—April 11, 1939

And now at this day came the said appellant, by his attorney, and moved the court now here to place this cause on the calendar and assign same for argument on the May call, and without printed case and briefs, and for judgment on the record, which motion having been argued by J. J. McManamy, Esq., for the said appellant, and by J. Arthur Moran, Esq., for the said respondents, and submitted, and the court being now sufficiently advised of and concerning the said motion, it is now here ordered that the motion for judgment on the record, be, and the same is hereby granted.

[fols. 22-23] IN SUPREME COURT OF WISCONSIN

Walworth Circuit Court. Opinion Per Curiam

ERNEST NEWTON KALB, Appellant,
MARGARET KALB, Plaintiff,

vs.

HENRY FEUERSTEIN and HELEN FEUERSTEIN, his wife,
Respondents

JUDGMENT—April 20, 1939

This cause came on to be heard on appeal from the judgment of the Circuit Court of Walworth County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Walworth County, in this cause,

be, and the same is hereby, affirmed with costs against the said appellant taxed at the sum of Twenty-eight and 50/100 (\$28.50) Dollars.

[fol. 24] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN, JANUARY TERM, 1939

ERNEST NEWTON KALB, Appellant,

vs.

HENRY FEUERSTEIN ET AL., Respondents.

Appeal from a judgment of the circuit court for Walworth county: Edgar V. Werner, Circuit Judge. Affirmed.

This case was here upon a former appeal which was from an order sustaining a demurrer. The Supreme Court of the United States having declined to review the determination of this Court because it was not final, the record was remitted to the trial court. There such proceedings were had that a final judgment dismissing the plaintiff's complaint was entered on December 31, 1938. From that judgment the plaintiff appeals.

[fol. 25] OPINION—Filed April 20, 1939

By the Court.—The issues raised upon this appeal were considered by this Court in *Kalb v. Feuerstein* (1938), 228 Wis. 525, 279 N. W. 687. For the reasons there stated as grounds for sustaining the demurrer to the complaint, the judgment of the court dismissing the complaint should be affirmed.

The judgment appealed from is affirmed.

[fol. 26] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER ALLOWING APPEAL—Filed May 19, 1939

The petition of Ernest Newton Kalb, appellant, in the above entitled matter, for an appeal therein to the Supreme Court of the United States from the Supreme Court of the

State of Wisconsin, and the Assignment of Errors filed herewith and the record of said cause having been considered:

It Is Ordered: That an appeal be and is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Wisconsin as prayed in said petition and the Clerk of the Supreme Court of the State of Wisconsin shall prepare and certify a transcript of the records and proceedings in the above entitled cause as shall be designated by precept of the parties and transmit the same to the Supreme Court of the United States within thirty days from date hereof.

It Is Further Ordered: That the appellant will execute his undertaking in the sum of five hundred Dollars conditioned that he shall prosecute said appeal to effect and if appellant shall fail to make his plea good, to answer all damages and costs of the respondents.

It Is Further Ordered: That the appeal herein shall operate as a supersedeas.

May 19, 1939.

Marvin B. Rosenberry, Chief Justice of the Supreme Court of the State of Wisconsin. (Seal Supreme Court of Wisconsin.)

[fol. 27] IN SUPREME COURT OF WISCONSIN

[Title omitted]

PETITION FOR APPEAL—Filed May 19, 1939

The petitioner, Ernest Newton Kálb, respectfully represents that he is a citizen of the United States and a resident of the State of Wisconsin, and considering himself aggrieved by the final decision of the Supreme Court of the State of Wisconsin in the above entitled cause wherein he is the appellant therein, hereby prays that an appeal be allowed to the Supreme Court of the United States from the decree entered in said cause by the Supreme Court of the State of Wisconsin on the 20th day of April, 1939, by which it affirmed the judgment of the Circuit Court for Walworth County, Wisconsin, dismissing the plaintiffs complaint.

STATEMENT

The case is one in which the validity of the statute of the United States is drawn in question, to-wit, 49 Statutes at

Large 943, Chapter 792, approved August 28, 1935, amending Section 75 (n) of the Bankruptcy Act and known as the new Frazier-Lemke Act wherein the Supreme Court of the State of Wisconsin decided a federal question of substance not theretofore determined by the Supreme Court of the United States. That the part of the said statute under [fol. 28] which the appellant asserts his rights relates to the exclusive jurisdiction of the federal court of the person of the petitioner and all of his property after the filing of his petition pursuant to said act. The appellant asserts that his rights under this statute have been denied because the Supreme Court of the State of Wisconsin has decided that this statute of itself does not effect a stay of proceedings in a mortgage foreclosure pending in a state court at the time the appellant filed his petition under Section 75 (n) of the Bankruptcy Act, thereby drawing in question the validity of a federal statute and deciding in a way probably not in accord with applicable decisions of the Supreme Court of the United States.

Manner in which the Question Arose in the Trial Court

The complaint sets up that the appellant is a farmer, and that on the 2nd day of October, 1934, he filed his petition in the District Court of the United States for the Eastern District of Wisconsin under Section 75 (n) of the Bankruptcy Act as amended, that foreclosure of a mortgage on his farm was pending in a county court at that time. That his petition for relief under the Bankruptcy Act was dismissed on the 27th day of June, 1935. That after the amendment to Section 75 approved August 28, 1935, to-wit, on the 6th day of September, 1935, the appellant's petition was reinstated in the District Court of the United States by order of that court, and on that day a certified copy of such order of reinstatement was served upon the Judge of the County Court in which the mortgage foreclosure was pending. That on the 16th day of September, 1935, the said Judge entered an order in his court confirming a sheriff's report of sale theretofore had in the foreclosure proceedings and directed the delivery of a deed thereunder to the purchaser. The appellant asserts that the County Court was wholly without jurisdiction to confirm the sheriff's report of sale on September 16, 1935, and was without [fols. 29-30] jurisdiction to direct the delivery of a deed by the sheriff and that such order is wholly void.

The defendants interposed a demurrer to the complaint which was sustained by the Circuit Court for Walworth County and the order sustaining the demurrer was affirmed by the Supreme Court of the State of Wisconsin and thereafter the Circuit Court entered a judgment dismissing the complaint and on appeal to the Supreme Court of Wisconsin the judgment dismissing the complaint was affirmed.

ASSIGNMENT OF ERROR

(a) The court erred in its judgment directing that the order of the Circuit Court for Walworth County sustaining the demurrer be affirmed.

(b) The court erred in affirming the judgment of the Circuit Court dismissing the complaint.

PRAYER FOR REVERSAL

For which errors the appellant above, Ernest Newton Kalb, prays that the said judgment of the Supreme Court of the State of Wisconsin made on the 20th day of April, 1939, in the above entitled cause be reversed and judgment ordered in favor of this appellant, and that a authenticated transcript of the proceedings in this court may be transmitted to the Supreme Court of the United States, and that an order be entered fixing the amount of the bond to be required of the appellant in connection with this petition for appeal.

Ernest Newton Kalb, Petitioner.

Duly sworn to by Ernest Newton Kalb. Jurat omitted in printing:

[fols: 31-35] [File endorsement omitted]

[fols. 36-37] Bond on Appeal for \$500.00 approved and filed May 25, 1939. Omitted in printing.

[fols. 38-43] Citation in usual form showing service on J. Arthur Moran. Filed May 31, 1939. Omitted in printing.

[fol. 44] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 45-48] SUPREME COURT OF THE UNITED STATES

October Term, 1938

No. 375.

ERNEST NEWTON KALB AND MARGARET KALB, Appellants,

vs.

HENRY FEUERSTEIN AND HELEN FEUERSTEIN

ORDER AS TO RECORD ON FORMER APPEAL—Filed April 29,
1939

On the petition hereto annexed:

It is ordered: That the transcript of the record of the Supreme Court of the State of Wisconsin now on file in this Court may be used by the appellants in so far as the same is applicable on an appeal to this Court from the judgment entered in the Supreme Court of the State of Wisconsin on April 20th, 1939.

Dated this 29 day of April, 1939.

Charles E. Hughes, Chief Justice.

[fol. 48½] [File endorsement omitted.]

[fol. 49] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION
OF THE PARTS OF THE RECORD TO BE PRINTED—Filed June
19, 1939

Comes now the appellant in the above entitled cause and states that the points upon which he intends to reply in this Court in this case are as follows:

Point I. That the Supreme Court of Wisconsin erred in finding and holding:

(a) That the order of the Circuit Court for Walworth County sustaining the demurrer of Henry Feuerstein and Helen Feuerstein to the complaint be affirmed.

Point II. That the Supreme Court of Wisconsin erred in affirming the judgment of the trial court dismissing the plaintiff's complaint.

And the appellant further states that only the following parts of the record, as filed in this Court, need be printed by the Clerk for hearing in this case.

Title of Paper

Plea to Wisconsin Supreme Court.

Affidavit of default to amend complaint.

Judgment dismissing the complaint.

Notice of entry of judgment.

[fol. 50] Notice of appeal to Wisconsin Supreme Court and proof of service.

Undertaking on appeal to Wisconsin Supreme Court and proof of service.

Notice to advance cause to May calendar for decision and affidavit on which motion was made and proof of service.

Order denying defendants motion to modify former opinion.

Order granting motion to advance cause on calendar.

Opinion of Supreme Court of Wisconsin.

Order allowing appeal to United States Supreme Court and petition on which same was made.

Separate statement for jurisdiction.

Citation and proof of service.

Præcipe and proof of service.

Bond on appeal to Supreme Court of the United States.

William Lemke, Fargo, North Dakota, Appellants
Attorney. James J. McManamy, Madison, Wisconsin, Appellants Attorney.

[fol. 51] [File endorsement omitted.]

[Endorsed on cover:] Enter William Lemke. File No. 43,527. Wisconsin, Supreme Court. Term No. 120. Ernest Newton Kalb and Margaret Kalb, His Wife, Appellants, vs. Henry Feuerstein and Helen Feuerstein, His Wife. Filed June 19, 1939. Term No. 120 O. T. 1939.